

Sick, Sebastian et al.

Research Report

Workers' Participation in Europe: Challenges facing the European policy of the European Parliament and the European Commission for 2014 and subsequent years

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Sebastian Sick

with **Oliver Emons, Norbert Kluge, Lasse Puetz, Marion Weckes and Aline Hoffmann**

Workers' Participation in Europe

Challenges facing the European policy of the European Parliament and the European Commission for 2014 and subsequent years

At a glance...

- The economic and financial crisis has raised questions about the meaning and purpose of corporate governance. After the manifest failure of the economic-liberal “shareholder value” model, a new model of “good corporate governance” deserves a closer look. How can this be optimally backed up and embedded in European company law, as well as in the European Directives on employee involvement?
- In 18 of the 28 EU Member States, employee participation in top-level management is provided for by law. In 12 EU Member States and in Norway, these practices are widespread. Workers' participation at company board level is a core component of European company law, and information and consultation are basic rights in a social Europe.
- European policy must pay attention to protecting, strengthening and further developing workers' rights in the interest of enhancing Europe in the eyes of its citizens and for the sake of its economy. There should be no loopholes that make it possible to circumvent workers' participation.

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1 | Workers' participation at company board level – for strong employee involvement in Europe

The German model of workers' participation in supervisory boards and via works councils has often been praised for its positive effects during the economic and financial crisis due to its contribution to effective crisis measures based on social partnership. Workers' participation is one of the core components of the social market economy. In Europe, there are many different forms of employee involvement. Eighteen of the 28 EU Member States legally provide for the participation of employees' representatives in a company's supervisory board or administrative board. In 12 EU Member States and in Norway, the participation of employees' representatives in top-level management is widespread in both private and state-owned companies. This model of workers' participation is also embedded in European company law, namely in EU legislation on the European Company (*Societas Europaea* or SE), the European cooperative (*Societas Cooperativa Europaea* or SCE) and cross-border mergers. Furthermore, employees' information and consultation rights are contained in the expanded *acquis communautaire*, for example, in the EU Framework Directive on information and consultation, and in the EU Directives on collective redundancies and the transfer of undertakings. Employees' representatives exercise their rights not only in national works council bodies but also in over 1,000 European Works Councils, which represent more than 18 million employees. Participation, information and consultation of employees are thus a component of European social policy (Art. 153 Abs. 1 e), f) TFEU). The right to information and consultation is a basic right of employees in Europe (Art. 27 of the Charter of Fundamental Rights). This makes employee involvement a cornerstone of social Europe.

The economic and financial crisis has raised questions about the meaning and intent of corporate governance. To what extent have companies been turned into the pawns of owners and managers? How can companies contribute positively to society? How can and should interests other than those of the shareholders be given a voice at top management level?

We need to reopen the political debate on the model of "good corporate governance" for the sake of sustainability and sustainable future prospects for employment and company locations within the framework of efforts to 'reindustrialise' Europe. How can influence best be brought to bear so that this model is optimally supported by and embedded in European company law and the European Directives on employee involvement?

Historically, employee involvement in top-level management has taken various forms in the EU Member States. Workers' participation rights may be particularly strong in Germany, but they exist elsewhere, too. Even in countries without statutory participation in top-level management but with a robust collective bargaining system, there are viable options enabling employees' representatives to influence company decision-making. These forms must prevail within the framework of ongoing efforts to adapt company law to the requirements of the capital market on the Anglo-Saxon model, as well as the competition between legal regimes to which this has given rise.

In the interest of a Europe whose companies must be equipped to perform well in the face of global competition, we need to think about better options with regard to competition law when it comes to large-scale European company mergers.

In this perspective, political discussion and action during the upcoming legislative period of the European Parliament and the European Commission is evidently needed in the following eight areas:

- **Employee involvement as part of European company law**
- **Single-Member Private Limited Liability Company (*Societas Unius Personae* or SUP) / European Private Company (*Societas Privata Europaea* or SPE)**
- **European Company (*Societas Europaea* or SE)**
- **European Works Councils**
- **European Directive on information and consultation – revision by REFIT**
- **Sustainable company with fair industrial relations – good “company management” and corporate governance**
- **Corporate Social Responsibility (CSR) – CSR reporting**
- **Employee financial participation**

2 | Workers' participation as part of European company law

In the absence of a uniform standard for mandatory employee involvement in top-level management, the launching of more and more company forms under European legislation threatens to undermine and circumvent workers' participation at national level. This cannot be in the interests of a European policy approach which is based on social integration, and Europe has to be more than a Europe for banks and financial investors.

National legal forms, such as the AG and GmbH in Germany, are now competing with European legal forms, such as SE, SCE and EEIG (European economic interest grouping), and, due to cross-border mobility, with foreign legal forms, such as the British PLC or Ltd. or the Dutch B.V. Because employee involvement in the supervisory board at the enterprise level is based on the relevant company law regime, the option of registering a company in one Member State while in fact being active in another (i.e., splitting the registered office and the head office) threatens to sell out workers' participation rights and the rights of other stakeholders (for example, Air Berlin Plc & Co. KG without board-level workers' participation rights). The possibility to split company headquarters was excluded in previous Directives on European legal forms (SE, SCE), with good reason.

Future European legal forms and a possible Directive on the transfer of seat (the so-called 14th Directive) must take their bearings from the regulations on the European Company (SE), in order to protect stakeholders. In particular, they must rule out the splitting of companies' registered offices from head offices.

Workers' participation is part of European company law and of corporate governance. Social Europe must also find expression in European law in this respect, too. The Lisbon Treaty aims to support and supplement the efforts of the EU Member States with regard to employee involvement (Art. 153 Abs. 1 f) TFEU).

European policy should thus advocate the following:

- Strengthening and further developing board-level workers' participation, as well as information and consultation at European level.
- Establishing obligatory participation of employees' representatives at the highest level of the companies as a general element of European company law.
- Against a backdrop of regime competition, protection of employees' and stakeholders' rights against loopholes which would enable the participation rights to be circumvented.

- Unity of registered office and head office in all future legal acts in the area of company law.
- Shaping workers' participation in a possible EU Directive on the transfer of seat to a standard which at least matches that of the SE legislation; and making negotiations mandatory *before* entry in the company register. This should also apply to regulations concerning cross-border mergers.

3 | Single-Member Private Limited Liability Company (*Societas Unius Personae* or SUP) / European Private Company (*Societas Privata Europaea* or SPE)

The proposed corporation held by only one member – the Single-Member Private Limited Liability Company (*Societas Unius Personae* or SUP) – basically amounts to a licence to circumvent Germany’s laws on workers’ participation at board-level. This is because the European Commission has, on the one hand, dispensed with any regulation on board-level employee representation, while on the other hand it permits the splitting of headquarters. This would enable a German GmbH, even though it may be engaged in real business activities and have its administrative centre in Germany, to take the form of a Single-Member Limited Liability Company and transfer its legal registered headquarters to a state without such board-level participation rights (for example, the United Kingdom), to avoid falling under the scope of German board-level employee representation requirements. This loophole would by no means be limited to SMEs, however, but could also be used for larger group companies with board-level workers’ participation.

On 9 April 2014, the European Commission, within the framework of a package of measures on corporate governance, submitted the “Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies” (SUP) (COM(2014) 212 final – 2014/0120 (COD)). With this draft Directive, the Commission is, in its own words, pursuing the – in itself – scarcely controversial goal of “making it easier for potential founders of companies and especially SMEs to establish companies abroad”. From a workers’ participation standpoint, however, it is important that efforts to promote small and medium-sized enterprises are not made at the expense of social standards and the standards of employees’ rights and participation rights in Europe.

Already in 2011, the European Commission failed in the Council with its plan for a European Private Company (SPE), not least because of objections in principle by the German government. The European Commission has since dropped this plan. However, the reasons for rejecting an SPE apply even more strongly to the SUP. The arguments against have not been taken into consideration in the current draft Directive. On the contrary, the risks to employees, creditors and tax revenues entailed by implementing the proposal for a Single-Member Limited Liability Company far exceed those pertaining to the European Private Company.

Presumably the, as seems likely, politically unacceptable SUP proposal was put forward for the purpose of making the previously mooted SPE look like a “workable compromise”. A particularly problematic aspect of this is the change in the legal basis for the proposal (Art. 50 Abs. 2 f TFEU). This is not only the wrong legal basis, but it would also enable majority decision-making in the European Council rather than unanimity.

This European legal form would not furnish more legal security; instead, the competition established between the SUP and national legal forms would lead to a “race to the bottom” with regard to legal standards. National protective standards, such as those enshrined in the German ‘entrepreneur company’ (*Unternehmergeellschaft*) or ‘limited company’ (*GmbH*), would be eroded.

European policy should thus advocate the following:

- Rejection of a SUP proposal which would also allow large group companies to circumvent workers’ participation.
- Basing the legal minimum standards for employee involvement on the model of the SE legislation also in the case of the SUP; the lack of any regulations about this in the SUP must be rejected in principle.
- The threatened splitting of registered office and head office must be prevented by all means because it is virtually a license to avoid board-level employee participation; it would enable the proliferation of letterbox companies.
- The envisaged, largely control-free founding of companies online within three days (*‘Blitzgründung’*) with merely symbolic founding capital of only 1 Euro neglects the protection of creditors, consumers and the general public, and should thus be rejected.
- Cross-border activities must be a prerequisite for the SUP. The SUP according to the Commission’s proposal could be founded instead of a UG or GmbH purely on a national basis, without a cross-border dimension: even a baker in Düsseldorf could set up as a British SUP; this contradicts the principle of subsidiarity.

After more than ten years after the entry into force of the European Company (SE), we can say that strong employee involvement in top-level management is no obstacle to the establishment of SEs. However, because the regulations on participation have to date been static in nature, oriented towards the state of affairs at the time the SE is founded, many companies do not have board-level workers' participation, even though their workforce has grown in the meantime. Periodic renegotiation is not foreseen, because this is provided for only in the event of structural changes. Avoidance of board-level employee participation is not the declared aim of the SE regulation, however.

Workers' participation in the European Company (SE) is determined through negotiations between the employees' and the employer's side (Directive 2001/86/EC of 10.11.2001). The fall-back position is the highest level of board-level participation rights in place prior to the founding of the SE. The result is a Europeanised form of board-level participation by means of an international composition of the supervisory or administrative board and the formation of a European Works Council. In this way, foreign workforces learn about Germany's workers' participation culture and vice versa. The successful model of workers' participation can thus gain entry to other countries. German employees' representatives obtain the opportunity to get involved in foreign bodies, and colleagues from abroad participate in German supervisory boards. Examples include BASF, Allianz and MAN. This represents an enormous window of opportunity for workers' participation in Europe.

At the same time, one of the aims of the SE law is to exclude avoidance of workers' participation laws by founding an SE. There is a loophole here that must be closed. Many SEs are founded just under the threshold for one-third participation (500 employees) and parity-based participation (2,000 employees) and then grow subsequently.

European policy should thus advocate the following:

- Rises in the number of employees in an SE must lead to an entitlement to renegotiate participation arrangements; the statutory fall-back solution should take such a change into account.
- It must be the aim of the SE legislation to strive for employee participation at the top level of the SE by all means and not to rule it out in advance in cases in which there was no form of employee involvement in top-level management among the participating companies before the founding of the SE (i.e., the "before and after principle" provided for in the law today).

Over 1,000 European Works Councils (EWC) represent 18 million employees in total. The EWC has thus become an important instrument over the 20 years it has been in existence and is increasingly recognised as playing an effective role in international companies. In companies whose activities are increasingly cross-border, the EWC is often the sole body in a position to meet with the top European management, even if participation rights exist at the national level.

The increasing cross-border nature of company activities in the European single market requires a Europeanisation of the work of trade union and works councils.

If the European Works Council is to become effective and proactive, it must be involved (in good time) before important company decisions are taken. Otherwise it cannot perform effectively and make up for opportunities for exerting influence lost at the national level.

A number of significant improvements have already been made with the Recast of the EWC Directive 2008 (Directive 2009/38/EC of 6.5.2009). More progress is needed, however. By 5 June 2016, the European Commission must report on implementation of the Directive and, if need be, make appropriate proposals.

European policy should thus advocate the following:

- Creation of real injunctive relief for EWCs ensuring that information and consultation is provided in good time before company decisions are taken.
- Sanctions should be stepped up in the event of violations of the company's duties as laid down in the EWC Directive and/or EWC agreements.
- The number of mandatory annual meetings of the EWC should be raised to at least two a year.
- The threshold of 1,000 employees for the founding of an EWC should be lowered.
- The negotiating period of three years should be reduced.
- Trade unions should be given the right to participate in EWC negotiations and EWC meetings.

With the so-called “REFIT for Growth”, the European Commission aims to realise its policy aims of “better regulation” and “simplification”. Supposedly, Europe’s small and medium-sized enterprises in particular are to be relieved of unnecessary bureaucratic regulations. However, this size of enterprise is far from unduly affected by the supposed “burden of employee involvement” because only a relatively small number of companies with fewer than 50 employees have employees’ representation. Thus a different interpretation of REFIT suggests itself: the European Commission is seeking to narrow employees’ participation options under false pretences; this includes employees’ right to information and consultation, which is among the fundamental rights enforceable throughout Europe.

The provisions affected by REFIT include, among other things, employment protection, temporary work and the Directives on information and consultation of employees. The latter lay down EU-wide minimum standards for employee involvement. This provides that employees in companies with more than 50 employees and in establishments with more than 20 employees should be informed and consulted “effectively and regularly” on significant changes in the workplace. These entitlements also include establishment of a right to workplace representatives. These minimum standards represented an enormous advance for industrial relations in many central and eastern European EU countries, for example. Thus the Directives have carried out what the Lisbon Treaty demanded.

Only in 2010 did the European Commission evaluate the three key Directives on information and consultation. The result was positive, according to the experts: the Directives were assessed as “relevant, effective and consistent”. Nevertheless, the Commission soon afterwards commenced another review.

REFIT harbours the danger that standards of employee involvement will be lowered in what is alleged to be the interest of “efficiency and simplification”. The initiative also threatens to squeeze employees’ fundamental right to information and consultation (Art. 27 EU Charter of Fundamental Rights) in SMEs in particular – companies in which it is already more difficult for employees to assert their rights.

European policy should thus advocate the following:

- The existing rights of employees to participation and to information and consultation must not be narrowed in the course of implementing the “REFIT for Growth” in the guise of “efficiency” and “simplification”.

- In the event of further company law and labour law projects (such as the SUP), participation and information and consultation must be demanded as components of European law.

7 | Sustainable Company with Fair Industrial Relations – Good “Company Management” and Corporate Governance

Employee involvement provides positive impetus, especially when it comes to the sustainability of company strategy. Ultimately, the employees have a fundamental interest in the long-term maintenance of the company and its jobs. Thus employees’ representatives bring to the table a perspective oriented towards sustainability, correcting any orientation towards short-term profits.

In the Introduction of the Commission’s Green Paper “European Corporate Governance Framework” of 5 April 2011, reference is made in the first paragraph to the Commission’s Communication “Towards a Single Market Act”: “It is of paramount importance that European businesses demonstrate the utmost responsibility towards not only their employees and their shareholders but also towards society at large.” Corporate governance and corporate social responsibility are key elements in building people’s trust in the single market.” One can only agree with this.

Something to criticise, however, is the narrowing of the European Commission’s approach, which neglects the dualistic supervisory board system and ignores employee involvement in company organs. By contrast, as an insight derived from the 2008/2009 economic crisis, the German Corporate Governance Code rightly underlines the interests of a company as follows: “taking into account the interests of shareholders, its employees and other stakeholders with the objective of sustainable creation of value”.

This approach currently features in the discussion on revision of the OECD’s Corporate Governance Principles.

The narrow view taken by the European Commission is also evident in the proposal to revise the Shareholders Directive (Directive 2007/36/EC), presented in a package of measures on 9 April 2014 (COM(2014) 213 final – 2014/0121 (COD)). The plans for mandatory voting rights for the annual general meeting on remuneration (“say on pay”) and on transactions with related companies and persons (related party transactions) not only disregard German law on company groups but also threaten, in particular, to undermine the established role of the German supervisory board.

European policy should thus advocate the following:

- Corporate governance in Europe and in the OECD should be clearly guided in the relevant documents by the model of the socially, environmentally and economically sustainable company.

- Workers' board-level participation should be regarded as a component of corporate governance. The independence of employees' representatives in company organs should be recognised.
- The competences of supervisory boards should not be restricted by a one-sided orientation towards the monistic administrative board model. The supervisory board (with board-level employee representation) and not the annual general meeting is the key organ exercising control in companies in continental Europe.
- Employee interests must also be considered when discussing International Financial Reporting Standards (IFRS). Therefore the trade unions must have the possibility to send a representative to the supervisory board of the reformed European Financial Reporting Advisory Group (EFRAG).

Promoting CSR has been on the political agenda for years. Binding requirements for reporting and verification of CSR practice are still lacking. The current European debate on an EU Directive on company reporting, which takes CSR into account, is a small step in the right direction. The European Commission has taken up the need for transparent external company communication in its proposal on the “disclosure of non-financial information by companies and groups” of Spring 2013, stipulating reporting on such non-financial information as principles, risks and results in relation to environmental, social and employee matters, respecting human rights, combating corruption and bribery, as well as diversity in supervisory boards.

Previous reporting practice shows that transparent communication of CSR measures or transparent and comparable reporting are urgently necessary in order to lend these measures credibility and to move beyond public relations exercises.

CSR to date has been a voluntary company strategy referring to sustainable, long-term company development pursuing social and environmental goals besides economic ones in a coordinated way. A new definition put forward by the European Commission in 2011 describes CSR as “the responsibility of enterprises for their impacts on society”. Only if the relevant legal provisions and collective agreements between the social partners are respected can this responsibility be exercised.

In practice, advanced, more binding solutions have emerged. Thus, agreements on CSR have been concluded between the European Works Council, trade unions and management. Such agreements help to safeguard fundamental social rights across company groups with reference to the ILO core labour standards. Particularly important in relation to sustainability are transparent dialogue and participation options. Thus in its Communication “A new EU strategy (2011–14) for company social responsibility (CSR)” (COM (2011) 681) the European Commission acknowledges “CSR as a contribution and supplement to social dialogue”. The European Commission is now conducting a public consultation to obtain feedback on the recently implemented CSR strategy.

European policy should thus advocate the following:

- CSR must in practice be understood as the result of dialogue between the social partners which includes European Works Councils where these are legally possible. Their existence is an indicator that CSR is being taken seriously.
- Presentation of companies’ CSR performance must be transparent and comprehensible or comparable. This involves more than PR measures.

- The relationship must be seen between the political goal of Europe's reindustrialisation pursued by the European Commission and the practice of CSR with binding involvement of employees' representatives.

Within the framework of European policy, employee financial participation is regarded as an opportunity for employees and society as a whole to participate more, and more effectively, in the success of the increasing Europeanisation of economic activity.

Employee financial participation involves various levels and forms: profit-sharing, employee shares and asset accumulation (“save as you earn” schemes). It is also foreseeable that in future, the European Commission will promote employee financial participation as a vehicle of social integration and societal participation in Europe, as well as to make working for small and medium-sized enterprises more attractive (Small Business Act).

Further benefits of employee financial participation are said to include: improving local purchasing power and thus increasing opportunities for doing business in a particular region; a high quality element in good enterprise management to contribute to raising incomes through participation in company success; as a component of asset accumulation to increase incentives and contribute to employee loyalty through a stronger identification with the company.

The positive participation of employees based on ownership and the associated sense of responsibility could help to strengthen corporate governance but cannot be a replacement for real employees’ representation and participation in company organs.

It is also argued that employee financial participation is suitable as a model for company succession (employee buy-outs) to enhance the continuity and thus the competitiveness of European companies and, at the same time, to bind them to the region.

European policy should thus advocate the following:

- It must be made clear that the introduction of employee financial participation is voluntary. It must not be used to replace existing remuneration, but serve solely to supplement existing remuneration systems and not inhibit negotiations on wages and salaries. Such schemes must be readily understood by employees and to that extent supplement other forms of employee involvement. Employee financial participation should be separate from pension systems. It can serve as an additional element in old-age provision on an individual basis, however.
- Companies operating across borders should be helped to overcome especially tax obstacles in EU and EEA countries in order better to achieve the goal of employee retention and loyalty by means of employee financial participation.
- Employee financial participation can also serve as compensation for lost purchasing power and as a corrective in the event

of recurring fluctuations. However, it must by no means be used to substitute for wage and salary increases or impinge upon collective bargaining. The conditions governing employee financial participation should be laid down in collective agreements. However, it can and must not replace actual employees' representation and codetermination in company organs as part of good corporate governance.

Imprint

Authors

Dr. Sebastian Sick

With:

**Dr. Oliver Emons, Dr. Norbert Kluge,
Lasse Puetz, Marion Weckes**

*experts on co-determination and
corporate governance
Hans Boeckler Foundation*

With:

Dr. Aline Hoffmann

*participation expert
European Trade Union Institute, Brussels*

Translation from German into English:

James Patterson

Contact Person

Dr. Sebastian Sick, LL.M.Eur.

Hans Boeckler Foundation
Co-determination department
Head of unit economic law

Hans-Böckler-Straße 39
40476 Düsseldorf
Tel.: 0211 / 77 78 257
Fax: 0211 / 77 78 4257

Sebastian-Sick@boeckler.de
www.boeckler.de

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